91-1180

Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF ARIZONA,
Petitioner,

-vs-

MARK AARON DANIEL,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA COURT OF APPEALS

BRIEF OF THE STATE OF ARIZONA ON PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

CRANE McCLENNEN
Assistant Attorney General
(Counsel of Record)
Department of Law
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

Attorneys for PETITIONER

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the requirement in Rule 804(b)(3) of corroborating circumstances clearly indicating the trustworthiness of the statement for a statement offered to *exculpate* the defendant apply to a statement offered to *inculpate* the defendant.

2. Are the "corroborating circumstances clearly indicating the trustworthiness of the statement" limited to the circumstances of the giving of the statement itself, or do they include the surrounding evidence that corroborates the statement given.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENTS	6
ARGUMENTS	
I.	
THE SIXTH AMENDMENT DOES NOT REQUIRE THAT THERE BE CORROBORATING CIRCUMSTANCES THAT CLEARLY INDICATE THE TRUSTWORTHINESS OF A STATEMENT AGAINST INTEREST THAT INCULPATES THE DEFENDANT.	6
II.	
ASSUMING THAT THE REQUIREMENT IN RULE 804(b)(3) OF CORROBORATING CIRCUMSTANCES APPLIES TO A STATEMENT THAT INCULPATES THE DEFENDANT, SUCH CIRCUMSTANCES ARE NOT LIMITED TO THE CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT ITSELF, BUT ALSO INCLUDE SURROUNDING EVIDENCE THAT CORROBORATES THE STATEMENT.	8
CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

Case	Page
Idaho v. Wright ___ U.S. ___ 110 S. Ct. 3139 111 L. Ed. 2d 638 (1990)	6, 8, 9
State v. Canaday 141 Ariz. 31 684 P.2d 912 (Ct. App. 1984)	7
State v. Daniel 86 Ariz. Adv. Rep. 59 (Ct. App., May 7, 1991)	1, 7
United States v. Alvarez 584 F.2d 694 (5th Cir. 1978)	7
United States v. Casamento 887 F.2d 1141 (2d Cir. 1989)	7
United States v. Fields 871 F.2d 188 (1st Cir. 1989)	7
United States v. Harrell 788 F.2d 1524 (11th Cir. 1986)	7
United States v. Patterson 819 F.2d 1495 (9th Cir. 1987)	7
United States v. Riley 657 F.2d 1377 (8th Cir. 1981)	7

Authorities

United States Constitution
Sixth Amendment 1, 7

United States Code
28 U.S.C. § 1257(a) 1

Arizona Rules of Evidence
Rule 804(b)(3) 6, 7, 8, 9

STATEMENT OF JURISDICTION

On May 7, 1991, the Arizona Court of Appeals issued its opinion in this matter. *State v. Daniel*, 86 Ariz. Adv. Rep. 59 (Ct. App., May 7, 1991). On October 8, 1991, the Arizona Supreme Court denied review. The Arizona Court of Appeals reversed the conviction based on what it considered to be a violation of the defendant's rights under the Sixth Amendment to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On May 13, 1989, two men entered a Fry's Food Store on South 16th Avenue in Tucson and robbed it. As a result of this robbery, the state charged Mark Aaron Daniel, Marvin Darneal Johnson, and Stacy Tims with two counts of armed robbery, class 2 felonies; two counts of conspiracy to commit armed robbery, class 2 felonies; two counts of aggravated robbery, class 3 felonies; burglary, a class 3 felony; and conspiracy to commit burglary, a class 3 felony. The trial court severed the trial of Stacy Tims from that of Mark Daniel and Marvin Johnson.

Prior to trial, the state indicated that it intended to use Stacy Tims' statement against Mark Daniel and Marvin Johnson, so the trial court held a hearing to determine whether there was sufficient corroboration to allow the admission of the statement as a statement against interest. (R.T. of Mar. 13, 1990, at 36.) Officer Paul Leonardi testified that he arrested Stacy Tims at 11:10 p.m. on June 1, 1989, handcuffed him, and read him his *Miranda* rights. (R.T. of Mar. 14, 1990, a.m., at 5-6.) Leonardi saw nothing to indicate that Tims was under the influence of alcohol or drugs. (*Id.* at 12-13.) Leonardi took Tims directly to the police station. (*Id.* at 38.)

Detective Nicholas Giacobbe testified that he interviewed Tims on June 1. (R.T. of Mar. 13, 1990, at 18.) He did not make any threats or promises, nor did he discuss any possibility of any plea bargain. (*Id.* at 19-20.) Tims discussed a total of seven robberies that he had committed, one of which was the May 13, 1989, robbery of the Fry's Food Store, which he said that he, Johnson, and Daniel committed. (*Id.* at 22-23.) He implicated Johnson in one other robbery, but did not implicate anyone else in any of the other five robberies. (*Id.* at 118, 142.)

Tims said that, the evening of the Fry's robbery, Marvin Johnson came by his house, and together they went to Mark Daniel's house. (R.T. of Mar. 13, 1990, at 39; Appendix C at 3.) The three of them decided to go to the home of Roy Daniel, who was Mark Daniel's cousin, and borrow Roy's car. (R.T. of Mar. 13, 1990, at 39; Appendix C at 3.) When they arrived, they learned that Glen Lewis had the car, so they went to Glen Lewis's house. (R.T. of Mar. 13, 1990, at 39-40; Appendix C at 3.) Lewis lent them the car, a green Dodge Aspen. (R.T. of Mar. 13, 1990, at 40.) Roy Lewis owned a .25 caliber chrome semi-automatic handgun, which was in the car when the three borrowed it. (R.T. of Mar. 13, 1990, at 67-68, 75-76.)

The three then decided that they needed to get some masks. (R.T. of Mar. 13, 1990, at 40-41; Appendix C at 4.) The three parked the car on a dirt road along the east side of the Fry's store, and Mark Daniel went into the store to purchase nylon stockings. (R.T. of Mar. 13, 1990, at 42-44; Appendix C at 4.) About an hour later, Tims and Johnson took some white plastic bags from the car and headed for the store, while Daniel remained in the car. (R.T. of Mar. 13, 1990, at 43, 70, 73-74, 135-37; Appendix C at 5, 8.) Tims entered the store followed by Johnson. (R.T.

of Mar. 13, 1990, at 43; Appendix C at 5-6.) Tims had a .25 caliber automatic handgun; Johnson did not have a gun; both were wearing brown gloves and black stocking masks. (R.T. of Mar. 13, 1990, at 73-74, 83; Appendix C at 6, 8, 10.) Johnson demanded money from the store manager, who refused to give it to him. (R.T. of Mar. 13, 1990, at 81; Appendix C at 6.) Tims approached the manager, pointed the gun at him, and demanded the money. (Appendix C at 6.) The manager opened a drawer and gave them the money. (*Id.*) Before leaving the store, Tims crouched down and looked out the front door to see if there were any police outside. (*Id.* at 8.)

After the robbery, Tims and Johnson left the store on foot, ran up the dirt road, and got into the car. (R.T. of Mar. 13, 1990, at 84-85; Appendix C at 10-11.) While driving away, a police can began following them. (Appendix C at 12.) When the officer turned on his overhead lights, Daniel slowed the car, and Tims and Johnson jumped out. (*Id.* at 12-13.) The last Tims saw of Daniel, he was driving off in the car. (Appendix C at 13.)

While he was relating Tims' statement, Giacobbe told about other witnesses's statements and other evidence that corroborated Tims' statement. (R.T. of Mar. 13, 1990, at 40, 45-49, 50-54, 58-59, 62-69, 71-72, 74-87, 88-90, 120-23, 128, 129-30.) The prosecutor then listed for the trial court the testimony from the other witnesses and other evidence that would corroborate Tims' statement. (R.T. of Mar. 14, 1990, a.m., at 74-78.) The trial court ruled that Tims would be unavailable if he refused to testify, that the statement was against Tims' penal interest, and that there was extensive other evidence corroborating the statement, and thus it was admissible. (*Id.* at 85-88; R.T. of Mar. 20, 1990, at 17-18.)

At trial, Roy Daniel and Glen Lewis testified that Mark Daniel (Roy's cousin) borrowed Roy's green Dodge Aspen on May 13, 1989, and that Marvin Johnson and Stacy Tims were with Mark Daniel. (R.T. of Mar. 16, 1990, at 74-77, 83, 114, 120, 122.) At that time, Roy Daniel owned a .25 caliber silver semi-automatic handgun, which was in the car when Mark borrowed it. (*Id.* at 79-80, 119-20.) Later that evening, Mark called Roy and told Roy to call the police and report that someone had stolen Roy's car, which Roy did. (*Id.* at 88-89, 142.)

The store employees testified that, on May 13, 1989, a man came into the store acting nervous and purchased a package of black nylon stockings. (R.T. of Mar. 16, 1990, at 29-30.) About 1 hour later, two men wearing black stocking masks and brown gloves entered the store, one of them carrying a .25 caliber silver semi-automatic handgun. (R.T. of Mar. 15, 1990, at 41, 45-46, 58, 61-62, 70, 72, 77, 99; R.T. of Mar. 16, 1990, at 17-18, 23-24, 29.) The man without the gun went to the manager and demanded that he put money into a white plastic bag that he had. (R.T. of Mar. 15, 1990, at 69-70, 74, 76; R.T. of Mar. 16, 1990, at 20.) When the manager refused, the other man came up and threatened him with the gun, so the manager open the cash drawer and gave them the money. (R.T. of Mar. 15, 1990, at 70, 96-98; R.T. of Mar. 16, 1990, at 21-23.) One of the men then went to another cashier and demanded money. (R.T. of Mar. 15, 1990, at 80, 101-02; R.T. of Mar. 16, 1990, at 23.) Before leaving the store, one of the men knelt down by the copy machine by the front door and looked out to see if anyone was there. (R.T. of Mar. 15, 1990, at 78, 104.) After leaving the store, they ran around the east side of the building. (R.T. of Mar. 15, 1990, at 50-51, 53-56, 81.)

That same night, Officer Paul Swank heard the report of the

robbery. (R.T. of Mar. 16, 1990, at 41-42.) About 2 miles from the location of the robbery, he saw suspects that matched the description that he had received. (*Id.* at 44-45, 48, 56.) He followed the car, and when he turned on his overhead lights, the car stopped and two men jumped out and ran. (*Id.* at 46-47.) He stopped and chased them, but was not able to catch them. (*Id.* at 48.) When he returned to his car, he saw the other car drive off. (*Id.*) When the officers later found the car, they found in it white plastic bags, a brown glove, a wallet belonging to Stacy Tims, a box that had contained nylon stockings, a holster for a small caliber gun, and a .25 caliber bullet. (*Id.* at 65, 69; R.T. of Mar. 20, 1990, at 40, 46-48.)

The state called Stacy Tims to testify, but he refused, even after receiving a grant of use immunity. (R.T. of Mar. 20, 1990, at 21-23.) Detective Giacobbe discussed the statement that Tims had made to him, and the trial court played it to the jurors. (*Id.* at 54-60, 73, 77.)

After receiving all of the evidence, the jurors found Mark Daniel and Marvin Johnson guilty of seven of the eight counts. (R.T. of Mar. 22, 1990, at 11-18.) On April 20 1990, the trial court sentenced Mark Daniel. Mark Daniel filed a timely notice of appeal from the judgment and sentence imposed. On May 7, 1991, the Arizona Court of Appeals issued an opinion reversing the conviction. (Appendix A.) On October 8, 1991, the Arizona Supreme Court denied review. (Appendix B.)

SUMMARY OF ARGUMENTS

1. Rule 804(b)(3) allows the admission of statements against the declarant's interest, and only requires corroborating circumstances clearly indicating the trustworthiness of the statement when the statement is offered to *exculpate* the defendant. This rule therefore has no requirement of corroborating circumstances when the statement is offered to *inculpate* the defendant.

2. The requirement in Rule 804(b)(3) of corroborating circumstances includes surrounding evidence that corroborates the statement given. The holding in *Idaho v. Wright* that a trial court may not consider surrounding evidence that corroborates the statement given applies only to statements admitted under the residual hearsay exceptions, and does not apply to Rule 804(b)(3).

ARGUMENTS

I

THE SIXTH AMENDMENT DOES NOT REQUIRE THAT THERE BE CORROBORATING CIRCUMSTANCES THAT CLEARLY INDICATE THE TRUSTWORTHINESS OF A STATEMENT AGAINST INTEREST THAT INCULPATES THE DEFENDANT.

In *Idaho v. Wright*, ___ U.S. ___, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), this Court held that the statement of an unavailable declarant is admissible if it is reliable. 110 S. Ct. at 3146, 111 L. Ed. 2d at 652. This Court further held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id*. Because Rule 804(b)(3) of the Arizona Rules of Evidence, which allows for the admission of a statement against interest, is a firmly rooted hearsay exception, a statement admitted under that exception would satisfy the

confrontation clause of the Sixth Amendment.

Although Rule 804(b)(3) of the Arizona Rules of Evidence requires that a statement against the declarant's interest that *exculpates* the defendant have corroborating circumstances that clearly indicate the trustworthiness of the statement, that rule contains no requirement that a statement against the declarant's interest that *inculpates* the defendant have such corroborating circumstances. Thus, there is no requirement under the Sixth Amendment that a statement that *inculpates* the defendant have corroborating circumstances before it is admissible.

In the present case, the Arizona Court of Appeals held that a statement against interest that *inculpates* the defendant is not admissible under Rule 804(b)(3) of the Arizona Rules of Evidence unless the corroborating circumstances clearly indicate the trustworthiness of the statement. *State v. Daniel*, 86 Ariz. Adv. Rep. 59, 60 (Ct. App., May 7, 1991) (Appendix A at 3.). Several federal circuits have adopted such a rule. *United States v. Casamento*, 887 F.2d 1141, 1170 (2d Cir. 1989); *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978). *United States v. Riley*, 657 F.2d 1377, 1383 (8th Cir. 1981). *United States v. Harrell*, 788 F.2d 1524, 1526 & n.3 (11th Cir. 1986). The First and the Ninth Circuits have specifically reserved this question. *United States v. Fields*, 871 F.2d 188, 192 (1st Cir. 1989); *United States v. Patterson*, 819 F.2d 1495, 1504 (9th Cir. 1987). To require corroboration for a statement that inculpates a defendant would amount to adding language to a rule that does not presently exist. This Court should grant certiorari to resolve whether such corroboration is required for a statement that *inculpates* the defendant.

Petitioner submits that such corroboration is not required. The Arizona courts imposed this requirement in *State v. Canaday*, 141 Ariz.

31, 684 P.2d 912 (Ct. App. 1984). The court there imposed this additional requirement because "we also do not agree with the state that simply fitting the declaration into a hearsay exception satisfies the confrontation clause." 141 Ariz. at 35, 684 P.2d at 916. In light of this Court's holding in *Wright* that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," the reasoning of the Arizona Court of Appeals was wrong on this point. Petitioner therefore requests that this Court grant the petition for writ of certiorari and hold that corroboration is not required for a statement against interest that *inculpates* a defendant.

II

ASSUMING THAT THE REQUIREMENT IN RULE 804(b)(3) OF CORROBORATING CIRCUMSTANCES APPLIES TO A STATEMENT THAT INCULPATES THE DEFENDANT, SUCH CIRCUMSTANCES ARE NOT LIMITED TO THE CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT ITSELF, BUT ALSO INCLUDE SURROUNDING EVIDENCE THAT CORROBORATES THE STATEMENT.

In the present case, the Arizona Court of Appeals held that the requirement in rule 804(b)(3) of corroborating circumstances applies to a statement that *inculpates* the defendant. *State v. Daniel*, 86 Ariz. Adv. Rep. 59, 60 (Ct. App., May 7, 1991) (Appendix A at 3.). It further held, based on *Idaho v. Wright*, that "corroborating circumstances" meant only the circumstances surrounding the giving of the statement itself, and could not include any surrounding evidence that corroborated the statement given. *State v. Daniel*, 86 Ariz. Adv. Rep. 59, 60 (Ct. App., May 7, 1991) (Appendix A at 4.). Petitioner submits that the Arizona Court of Appeals had misapplied *Idaho v. Wright*.

In *Wright*, this Court addressed the admissibility of a statement under Idaho's Rule 803(24). This Court noted that the reliability of statements under firmly rooted hearsay exceptions comes from the circumstances under which the statements were made, thus the reliability of a statement under Rule 803(24) could depend only on the circumstances under which the statement was made, so a trial court could not consider any surrounding evidence that corroborates the statement given. That reasoning does not apply to a statement under Rule 804(b)(3). Rule 804(b)(3) is a firmly rooted hearsay exception, and the reliability of such a statement comes from the circumstances under which it was made – a person would not make such a statement unless the person believed it to be true. The second sentence of the rule requiring corroborating circumstances thus imposes a requirement above and beyond the circumstances of the making of the statement itself, and clearly contemplates surrounding evidence that corroborates the statement given. The Arizona Court of Appeals thus was incorrect when it held that *Idaho v. Wright* precluded the trial court from considering surrounding evidence that corroborates the statement given when determining whether "corroborating circumstances clearly indicate the trustworthiness of the statement."

In the present case, the surrounding evidence corroborates every element of the statement that Stacy Tim gave. Testimony of Roy Daniel and Glen Lewis corroborated Tims' statement that he, Daniel, and Johnson were together that night, and corroborated Tims' statement of how they got the car and what was in it. Testimony of the store personnel corroborated Tims' statement of what they did to prepare for the robbery and what they did once they went into the store. Testimony of Officer Paul Swank corroborated Tims' statement of what they did when they saw the police

car following them. This is thus a case where the corroborating circumstances are overwhelming. The Arizona Court of Appeals therefore erred in holding that the trial court could not consider this corroboration.

CONCLUSION

Because Rule 804(b)(3) contains no requirement that corroborating circumstances clearly indicate the trustworthiness of a statement that inculpates a defendant, the Arizona Court of Appeals erred in imposing such a requirement. Further, assuming that an inculpating statement must have corroborating circumstances that clearly indicate the trustworthiness of the statement, the Arizona Court of Appeals erred in holding that the trial court could not consider any surrounding evidence that corroborated the statement given. Petitioner therefore respectfully requests that this Court grant this petition for writ of certiorari.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section

CRANE McCLENNEN
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONER

January 6, 1992

CRM90-1419/drl
431.BRF

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARK AARON DANIEL, Appellant.	)	No. 2 CA-CR 90-0256 DEPARTMENT A OPINION, filed May 7, 1991

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. CR-27740
Honorable Philip Fahringer, Judge
REVERSED

Grant Woods, The Attorney General, by
Paul M. McMurdie, Chief Counsel, and R. Wayne Ford,
Attorneys for Appellee, Phoenix.

Jim D. Himelic,
Attorney for Appellant, Tucson.

HATHAWAY, Judge.

Appellant was convicted after a jury trial of conspiracy to commit armed robbery and two counts of armed robbery, all class 2 felonies, and conspiracy to commit first-degree burglary, first-degree burglary and two counts of aggravated robbery, all class 3 felonies. The jury found one prior, non-dangerous class 3 felony, and the court imposed concurrent sentences of 12 years on each on the class 2 felonies and 10 years each on the class 3 felonies. We reverse.

FACTS

Two men with nylon stockings covering their heads robbed a Fry's Food Store at gunpoint and escaped in a car. Appellant was the driver of the car, although he maintains he had no knowledge of the robbery until later. When police attempted to stop the car, he pulled to the curb, the two men got out and ran away, and appellant drove on. He eventually parked at the apartment complex of his cousin, from whom he had borrowed the car, and then phoned his cousin to report the car stolen. Police found the car, searched it and discovered evidence linking one Stacey Tims to the robbery. After his arrest and proper Miranda warnings, Tims confessed to this and several other robberies, and implicated appellant and one other man, Marvin Johnson, in this robbery. Tims refused to testify at the trial of Johnson and appellant, but the state introduced, over objection, a redacted version of Tims' confession, and both men were convicted. No other substantial evidence linked appellant to the crimes. Appellant argues that: (1) his Sixth Amendment right to confront witnesses was violated by the trial court's admission of Tims' redacted confession; (2) a juror knew two of the state's witnesses; and, (3) evidence seized in the search of appellant's cousin's car was wrongfully admitted because the police lacked reasonable suspicion to stop the car earlier in the evening.

DISCUSSION

Our standard of review for trial court rulings regarding the admission of evidence is abuse of discretion. *State v. Albrecht*, 158 Ariz. 341, 343, 762 P.2d 628, 630 (App. 1988).

The Tims confession, while hearsay, was admitted under Ariz. R. Evid. 804(b)(3), 17A A.R.S. as a statement against the penal interest of an unavailable declarant after a corroboration hearing. The trial court

correctly relied upon *State v. Canaday*, 141 Ariz. 31, 684 P.2d 912 (App. 1984), which involved the admissibility of collateral inculpatory statements under Ariz. R. Evid. 804(b)(3).[1]

In *Canaday*, our Court of Appeals found that the Sixth Amendment right of confrontation is not violated by a collateral inculpatory statement against penal interest of an unavailable declarant if the statement has "the indicia of reliability." *Canaday*, 141 Ariz. at 34, 684 P.2d at 915. The court further found that the trial court must conduct a careful reliability inquiry with "proof of corroborating circumstances . . . that clearly indicate the truthfulness of the statement." *Canaday*, 141 Ariz. at 35, 684 P.2d at 916. Thus, the court implied that the reliability test for exculpatory and inculpatory statements is the same in Arizona. The court went on to hint that further restrictions on admissibility might be in order if the statement was made while the declarant was in custody, even though the court knew of no cases in which a collateral inculpatory statement made in a custodial situation was admissible. It stated that "there may be custodial interrogations which do have sufficient indicia of trustworthiness to fall within the hearsay exception to be admissible in the face of the confrontation clause." *Canaday*, 141 Ariz. at 36, 684 P.2d at 917. In the present case, the trial court conducted a thorough corroboration hearing pursuant to *Canaday* and, finding evidence of corroborating circumstances "overwhelming," admitted the statement at appellant's trial.

Nevertheless, we reverse because of the recent decision in *Idaho v.*

1. While the comments to Rule 804(b)(3) state that collateral *exculpatory* statements require a corroboration hearing, the comments are silent as to collateral *inculpatory* statements, which leaves their admission to the discretion of the trial court upon an assessment of reliability.

Wright, ___ U.S. ___, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), in which the United States Supreme Court held that evidence corroborating the truthfulness of the statement is irrelevant and may not be considered in examining the indicia of reliability of an accusatory hearsay statement. The Court found that "inherent trustworthiness" alone must be used to establish reliability. Under this test, the circumstances of the making of the statement must be examined; for example, an "excited utterance" is presumed inherently trustworthy because of circumstances which eliminate the possibility of fabrication, coaching or confabulation. *Wright*, ___ U.S. at ___, 110 S. Ct. at 3149, 111 L. Ed. 2d at 655.

Accordingly, we must examine the circumstances of Tims' statement to determine whether they indicate an inherent truthfulness. We find that they do not. Even though the declarant was apparently speaking against his own penal interest, there was some evidence that he had ingested drugs the day he gave his statement, that he may have been trying to improve his own situation by implicating appellant, and that he may have had motives of revenge against him. In short, it was not necessarily against his penal interest to inculpate appellant, and he may have believed it would further his own interest by creating the possibility of a "deal" with police. Tims' confession does not, as claimed by appellee, fall within a firmly-rooted hearsay exception. *See State v. Darby*, 123 Ariz. 368, 599 P.2d 821 (App. 1979) (portion of accomplice's admission against penal interest that implicated defendant not admissible against defendant under Ariz. R. Evid. 804(b)(3)), *following People v. Leach*, 15 Cal.3d 419, 124 Cal. Rptr. 752, 541 P.2d 296 (1975), *cert. denied*, 424 U.S. 926 (1976). Because the court erred in admitting Tims' confession, the convictions must be reversed.

We address the admissibility of the evidence seized in a search of

appellant's cousin's car an issue which may arise on retrial. Appellant's motion to suppress, based on the alleged lack of reasonable suspicion to stop the vehicle earlier in the evening, was denied by the trial court. We view the facts in the light most favorable to support the trial court's ruling on a motion to suppress. *State v. Sheko*, 146 Ariz. 140, 141, 704 P.2d 270, 271 (App. 1985).

The state conceded at the suppression hearing that the police did not have reasonable suspicion to stop the car, but argued that they conducted a valid inventory search of an abandoned vehicle. *State v. Davis*, 154 Ariz. 370, 742 P.2d 1356 (App. 1987). We agree that the search resulted not from the traffic stop, but from an owner's report that the vehicle had been stolen. Appellant intentionally abandoned the vehicle when he told his cousin to report it as stolen. *State v. Asbury*, 124 Ariz. 170, 602 P.2d 838 (App. 1979). Appellant had no standing to complain of the search and seizure of voluntarily abandoned property. *State v. Walker*, 119 Ariz. 121, 126, 579 P.2d 1091, 1096 (1978).

Reversed.

JAMES D. HATHAWAY, Judge

CONCURRING:
JOSEPH M. LIVERMORE, Judge
MICHAEL A. LACAGNINA, Judge

APPENDIX B

SUPREME COURT
STATE OF ARIZONA

402 Arizona State Courts Buliding
1501 West Washington
Phoenix, Arizona 85007-3329

Telephone: (602) 542-9396

October 9, 1991

RE: **STATE OF ARIZONA vs. MARK AARON DANIEL**
Supreme Court No. CR-91-0210-PR
Court of Appeals No. 2 CA-CR 90-0256
Pima County No. CR-27740

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 8, 1991, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED

Record returned to the Court of Appeals, Division Two, Tucson, this 9th day of October, 1991.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Attorney General, 1275 West Washington, Phoenix, AZ 85007 ATTN: Paul J, McMurdie, Esq., and Cran McClennen, Esq.
Jim D. Himelic, Esq., Jim D. Himelic, P.C., 177 N. Church, Suite 909, Tucson, AZ 85701
Joyce Goldsmith, Clerk of the Court of Appeals, Division Two, 416 W. Cingress, Tucson, AZ 85701
West Publishing Co., P.O. Box 64526, St. Paul, MN 55165
Mead Data Central, P.O. Box 8809, Dayton, OH 45401

av

APPENDIX C

This is Detective Giacobbe, payroll # 26123. Today's date is June 2, 1989. The time is now 0011 hours. I'm presently at the main police station, 270 South Stone, third floor interview room. I'll be speaking to a Mr. Stacy Tims.

Q STACY, could you state your full name for me, please, and spell your last name?

A STACY RENARD TIMS, T I M S.

Q What's your date of birth?

A 8-31-62.

Q What's your current home address?

A 113 West Navajo, that's (inaud)

Q Do you have a phone up there?

A Yes.

Q What is it?

A 293-5472.

Q Earlier this evening, do you remember being advised of your rights by some other officers?

A Yes.

Q And you understood your rights?

A Yes.

Q And you're willing to talk to us voluntarily now?

A Yes.

Q OK, we're gonna be discussing a total of seven robberies here, and I'm gonna be bringing you through them one at a time. So what I wanna do is I'll start off and ell [sic] you what the robbery is and what the date was and then I want youto [sic] just walk me through it from the time that you decided that you were gonna do the robbery, who you were with, what kind of cars you used and what you did afterwards..

A OK.

. . . .

Q OK, the Fry's robbery happened on May 13th, a little bit before ten.

A OK.

Q Now this one's a little complicated because you had two other guys with you and you borrowed a car earlier..

A Yeah yeah.

Q So try to walk me through it from when you guys first got together and made up your mind you were gonna do it. OK.

A Well we got together I think about..no it was the same day, they came and found me matter of fact.

Q MARVIN and..

A Came to my house ... wait a minute MARVIN ... MARVIN came to my house. And he told me he say, hey, man, you gonna do that or what, you know. I say what, he say need some money. I said well I don't know man I just got out of jail I don't know, I tell him to cool off And he say you know we can do it without you, you know. I say why not you know and he say

Q He said you know how to do it?

A Yeah I know how to do it you know.

Q OK.

A So I say well let's do it. So we went ... where..

Q Was it just you and MARVIN then or was MARK already with you?

A No, MARVIN came and picked me up and we went over to MARK's house.

Q OK.

A And we picked MARK up.

Q Up in the projects?

A Right.

Q Alright.

A And then we went over to his uncle's..

Q To ROY's house?

A Yeah.

Q Right there behind Mirasol Liquor?

A Yeah right there, right.

Q OK.

A And asked to use the car. I don't know if he let MARK use ... MARK went back and told his..

Q GLEN?

A GLEN that JIMMY said let him use the car..

Q OK.

A And so we took the car.

Q Alright.

A And so we had to go find masks, something.

Q OK..

A MARK went into the store..

Q MARK went into the store about an hour before?

A Before, before we did it..

Q Uhmm.

A Cause we had to get the stockings..

Q OK.

A That's what it was.

Q Alright.

A We didn't get stockings. We parked down in the dirt road, it was like a road..

Q There's a dirt road that runs north along the westside of Pueblo High School..

A Yeah...

Q That's the field?

A Right, right there.

Q OK.

A We walked down there for quite a ways, it was dark. And so me MARVIN went up ... went up the first time like it took us a while

and I guess I was just nervous from just being out there so ... shitting ... it took me about 15 minutes.

Q To get your nerve up?

A I was standing beside the store.

Q OK.

A For 15 minutes.

Q With MARVIN?

A With MARVIN.

Q Alright. MARK stayed in the car?

A Yeah.

Q OK.

A MARK is in the car. And ... we went and ... OK let's go around to the back and be in the ... so I can get out of all this light cause it's too ... And so we went around there. He said man, ... So I said well forget it let's go. So I just decided to go ahead and do it, pulled my thing down and ran into the store.

Q OK, so you were running..

A (inaud)

Q ..in the store..

A When I went into it I was running..

Q OK.

A I ran to, into the store ... two people and..

Q Do you remember seeing a girl out front picking up carts or something like that that you ran by?

A Uhmm.

Q OK. Either you or MARVIN said something about - she saw me. Do you remember which one of you two said that?

A Uh-um.

Q OK.

A Uh-um.

Q Who came, who went in the door first, you or MARVIN?

A I did, I went into the door first..

Q OK, that's probably right then.

A I went in the door first, And I ... When I was looking for the manager cause I ... And when I looked up MARVIN was saying, he said come ... he won't give me the money,

Q Who's holding the gun.

A I was holding it.

Q OK. MARVIN doesn't have any..

A It's a .25, MARVIN didn't have one.

Q OK.

A But he was ... I was holding the gun. So I ran up to him and I stuck the gun up here and I said, "give me the money." And so he opened the cash register, I mean not ...

Q A drawer?

A Yeah, a little ... the manager's station it's just.got a little drawer. Just a little drawer and he opened that and got the money. And MARVIN got some money out of the register.

Q OK so you got the money from the manger..

A From the manager.

Q And he went to the register..

A Yeah.

Q Where there was a lady?

A Uhmm cause I think MARVIN ran up on him the first time, MARVIN first found him, I think he got a roll of 20's from him at first.

Q Alright.

A But he wouldn't open the drawer for him.

Q Right.

A But he wouldn't open the drawer for him.

Q Right.

A Cause MARVIN ... it was hard to open the safe or something.

Q Did MARVIN hit him a couple of times do you remember?

A No, when I looked up ... when ... cause I was running down this way, I went this, we came from this way..

Q OK.

A And I went in this way cause I always do to..
so I went that way.

Q Alright.

A And MARVIN went that way, there was a lot of people, that was the most I ever had a lot of people in a store. And I was bumping into people and I couldn't ... then next thing I know I heard MARVIN and I looked around, he was with ... the manager.

Q Alright.

A So that's, that what I seen. And then that's when I went over.

Q Alright.

A And I told him to give me the money and he gave me the money.

Q After you got the money from him..

A Uhmm...

Q What did you do? Did you wait by the front door for a while?

A Yeah I wait, I waited for MARVIN.

Q Alright.

A Matter of fact I went and crouched down, I was looking out the front door to see if any you know any cop, police or anything..

Q Uhmm.

A So..

Q Were you guys wearing gloves that time?

A Yeah.

Q Alright.

A Brown ones.

Q Do you remember what you put the money in?

A It was a plastic papers, one of those same plastic papger [sic] sacks.

Q Did you get them from the inside of the car you borrowed?

A Uhmm, yeah ... No, no no no ... Yeah we did, yeah we got those

cause there was a lot of stuff in the car.

Q It was junky?

A Yeah, a lot of junk in the car. So yeah we got it out of the car because we put a small bag inside the big one, see. We had two bags.

Q Do you remember how much money you got?

A 2300 from that one too.

Q Somewhere right around..

A Right around that area.

Q The gun that you guys used in that robbery, that little .25..

A Uhmm.

Q Do you remember where that came from?

A No, MARK had it. MARK had it.

Q When did you find out that MARK had it, when you got the car or before that..

A I'd seen it before ... you know but I ... I said yeah so I don't even know where he got it from.

Q What did it look like?

A It was a little chrome .22, it was like, like the little wood side..

Q The grips?

A The grips.

Q OK.

A (inaud)

Q Alright, when you guys got the money from the store..

A Uhmm.

Q And you ran out, do you remember a lady on the phone?

A Uh-um, no, once ... no ...

Q Yes.

A When after we run out?

Q Yes.

A No.

Q OK. Alright, what did you do when you ran out?

A I always ... take my mask off so I can see.

Q OK.

A Cause I can hardly see ... dark with those on.

Q OK.

A So that's the first thing I do, I always take that off.

Q Alright.

A And then we just ran down the side of the building.

Q Up the dirt road?

A Up the dirt road.

Q OK. You guys got in the car..

A Jumped in the car.

Q Alright. Where did you get into the car at?

A At ... on the dirt road.

Q No, I mean which side of the car, what door?

A I got in..

Q Where did you sit?

A ... on the right side ...

Q In the front seat?

A ... the passenger seat ... no, yeah, front seat..

Q OK.

A ... and MARVIN in the back passenger on the same side I am right side.

Q OK. Then what happened?

A And so we ride, we were riding down the street. And I wanted ... wanted to get ... and MARK ...

Q Why do you say that?

A See cause ... I don't know it's just when I drive I ....I've never got chased..

Q Uh-huh.

A I've ... I've never got chased.

Q You're blessed.

A And I told, I told him ... no. I told, I told MARCUS (PH) and MARVIN, I said don't go down this ... this ... access road, I said don't go all the way down that road, I said go take..go through this neighborhood, go through the residential areas you know so they won't make out ... He says no, let me drive. It's his car..

Q Uhmm.

A Cause

Q Yeah.

A Cause ... so we went down and I think we got to..

Q Was that 29th?

A Yeah.

Q Where the officer first..

A Yeah, 12th and ... He told me to duck and I was too late to duck ... and..

Q Uhmm.

A So ... And so I ... OK he said OK. I says whatchu doing? As soon as MARK seen this (wrrrrr) ... I said oh no, now what ... so then we turned again, tried to turn onto ... I think it's a little ... when you get on the freeway.

Q Uhmm.

A And we went ... and he didn't hit his light, he followed us from there all the way to the projects. He got in, we got inside the projects before he turned his lights on..

Q OK.

A That's why we ... they just run through the projects..

Q OK.

A (inaud)

Q What happened when he turned the lights on?

A He turned the lights on and we get to the first section of houses, drove

up to the first section of houses and slowed, pulled up to the curb, slowed down. And bfore [sic] they..well before he can really slow down I ... I started fixing to go And MARK told me to grab everything..

Q Uhmm.

A So I grabbed everything and ... I was the first one out the car and MARVIN's right behind me...

Q OK.

A So we ran and..

Q MARK stayed in the car?

A Uh-huh.

Q OK.

A We jumped in MARVIN's car.

Q You guys ... MARVIN's car was parked in the projects?

A Uh-huh, we jumped in his car and left.

Q OK. Did you ever see what happened to MARK, what he did?

A No, no. The only thing I know, MARVIN was telling me that he heard a car speed up, accelerate..

Q OK.

A And that's ... that's what ... I didn't hear nothing cause I was..

Q So when you jumped out of the car you took the gun?

A The gun and the money.

Q The money, and the masks?

A And the, and the ... no, I didn't take ... I just took mine.

Q OK.

A I think everybody else took his.

Q Alright.

A I think I left my gloves and

Q Alright. When you and MARVIN took off, where did you go?

A To the Coach Room.

Q Is that a hotel?

A Yeah.

A Coachman Inn.

Q Yeah, you stayed there for the night?

A Yeah we stayed there for the night, got up the next morning. Went to the ... I forget the name of th emotel [sic], it's right on Oracle, right before you ... I think about two blocks..

. . . .